No. 12431

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

DEAN ACHESON, Secretary of State of the United States,

Appellant,

vs.

YEE KING GEE, by Yee Don Found, his next friend,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE LLOYD L. BLACK, *Judge*

BRIEF OF APPELLANT

J. CHARLES DENNIS
United States Attorney

JOHN E. BELCHER
Assistant United States Attorney
Attorneys for Appellant

OFFICE AND POST OFFICE ADDRESS:
1017 UNITED STATES COURT HOUSE
SEATTLE 4, WASHINGTON

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JURISDICTION

The jurisdiction of the District Court for the Western District of Washington was challenged at the outset because the Appellee at the time of the commencement of the action had at no time ever been in the United States, and the defendant Secretary

of State being domiciled in the District of Columbia.

The Act, Section 503 of the Nationality Act of 1940, 54 Stat. 1171, 8 U.S.C.A. 903, conferring jurisdiction on United States District Courts providing:

> "If any person who claims a right or privilege as a National of the United States is denied such right or privilege by any department or agency, or executive official thereof, upon the ground that he is not a National of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such department or agency in the District Court for the District of Columbia or in the District in which such person claims a permanent residence for a judgment declaring him to be a national of the United States."

The section further provides that if such person is outside the United States when he institutes his suit he may obtain from the diplomatic or consular officer of the United States in the foreign country in which he is residing a certificate of identity stating that his nationality status is pending before the court, and may be admitted to the United States with such certificate upon the condition that he shall be deported in case it shall be decided that he is not a National of the United States.

The Nationality Code of 1940 in subparagraph (g) Sec. 601, U.S.C.A., deals with and defines "Nationals" at birth, as follows:

> "A person born outside the United States * * * of parents one of whom is a citizen of the United States *who, prior to the birth of such person, has had ten years residence in the United States* * * * *." (Italics supplied).

The claim of permanent residence of this minor child entitling him to maintain this action in the District Court for the Western District of Washington rather than the District of Columbia stems from the domicile of his father at Seattle, whose claim to American citizenship is by reason of the birth of his father, Yee Wing Haw, of Chinese parents resident in the United States. This domicile we do not deny, nor do we deny the American citizenship of the father Yee Don Found. But is the domicile of the father the true criterion for the determination of "*permanent residence*" of this minor child, who at the time of the commencement of this action in March, 1948, had never been in the United States since birth, in order to confer jurisdiction upon the District Court for the Western District of Washington, or under such circumstances does the jurisdiction lie in the District Court for the District of Columbia?

STATEMENT OF THE CASE

This is an action under the Nationality Act of 1940 (Title 8, Sec. 903, U.S.C.A.) against the Secretary of State of the United States of America. It

was originally instituted against George C. Marshall as such Secretary of State and after his resignation Dean Acheson was substituted as party defendant (R. 10).

The Appellee was born in China March 16, 1941, of Yee Don Found, an American citizen, and Yee Shee, a native-born Chinese woman.

In March, 1948, this action was commenced by Appellee through Yee Don Found, his next friend, because the American Consul General at Canton, China, refused to recognize the claimed American nationality of this minor child on the ground that the father of said minor, Yee Don Found, had not resided in the United States for a period of ten years prior to the birth of Appellee in China and refused to issue a passport or travel document entitling him to enter the United States.

After the institution of the action in 1948 the father, Yee Don Found, returned to China and brought his wife and two other children to the United States. The Appellee was not permitted to accompany them at that time but later, and in accordance with the provisions of Sec. 903, Title 8, U.S.C.A., a visitor's permit was issued to him (R. 40), admitted in evidence as plaintiff's Exhibit No. 2, which stated that Appellee's nationality status was pending before the

court and which certificate provided that Appellee may be admitted to the United States upon the condition that he would be subject to deportation in case it should be determined by the court that Appellee is not a National of the United States (Ex. 2, R. 40) and he was admitted conditionally February 24, 1949 (R. 37).

At the time of the institution of the action in March, 1948, the mother of Appellee, the Appellee and his two brothers were in China, although after the passage of an amendment to the Nationality Code in 1946 she and the two minor children born prior to 1941 were eligible for admission to the United States, but they chose to remain in China until 1948, when the husband and father returned to China and brought his wife and the older children to the United States November 18, 1948 (R. 3).

Later, as already stated, and on February 24, 1949, Appellee was conditionally admitted to the United States for the purpose of prosecuting this action. On May 10, 1949, a trial was had and evidence adduced and the matter taken under advisement pending further briefs on behalf of the parties. Thereafter, and on August 25, 1949, the court delivered its oral decision (R. 66-76).

There is no question raised as to the citizenship of the father of Appellee, Yee Don Found, and if Yee Don Found resided in the United States for ten years immediately preceding March 16, 1941 (the date of the birth of Appellee in China) Appellee, although born in China and although he had never been in the United States, nevertheless, under the law, is a National of the United States. On the other hand, if Yee Don Found had not had "ten years' residence in the United States" at the time of the birth of Appellee in China, then Appellee is not a National of the United States under the law.

The father of Appellee came to the United States on September 3, 1929. He left this country for China seven years later (August 2, 1936) married, and returned to this country in 1938 (being absent about two years). He departed for China January 6, 1940, and returned September 4, 1941, after an absence of one year and nine months. Appellee was born in China on March 16, 1941 (while the father was still in China). From this it is apparent that prior to the birth of Appellee the father, whose United States citizenship is admitted (R. 41) was in the United States for a period of only eight years and four months (R. 71).

POINTS OF APPEAL

1. Did the District Court for the Western District of Washington have jurisdiction of this proceeding?

2. Where a minor child born in China in 1941 as the lawful issue of the marriage of an American male citizen and a Chinese woman, which minor child had never been in the United States, can such minor child claim as his residence the domicile of his father, who resides in Seattle?

3. If the father of such minor child had not resided in the United States for a period of ten years immediately preceding the birth of that child in China, is the child a National of the United States under the provisions of 8 U.S.C.A. Sec. 601(g)?

SPECIFICATION OF ERROR

1. The trial court erred in assuming jurisdiction of this proceeding because the minor had never resided in the United States and had no "permanent residence" therein, and jurisdiction is vested in the District Court for the District of Columbia.

2. On the merits, the trial court erred in entering its judgment declaring Appellee a National of the United States because the male parent, whose United

States citizenship is admitted, but "who, prior to the birth" of Appellee, has not "had ten years' residence in the United States."

ARGUMENT

We will first deal with the question of jurisdiction of the District Court for the Western District of Washington. To determine this, the claim of "permanent residence" in the Western District of Washington must be examined.

The District Court determined its jurisdiction by resorting to the domicile of the father. We have heretofore set out herein under the caption "jurisdiction" the applicable provisions of Sec. 903, Title 8, U.S.C.A. — the 1940 Nationality Act — and will not repeat those provisions here, but desire to call attention to the words used after conferring jurisdiction on the District Court for the District of Columbia, which are: "*or in the District Court for the district in which such person claims a permanent residence.*" (Italics supplied).

Appellee, although never before in the United States, claims Seattle, in the Western District of Washington, as his "permanent residence" for the purpose of having the principal question involved de-

termined in this jurisdiction instead of the District Court for the District of Columbia.

This claim of "permanent residence" is based entirely upon the domicile of his father, and is the sole ground upon which the District Court determined its jurisdiction (R. 72).

The requirement of a "claim of permanent residence" of one in a foreign country whose nationality is drawn in question, in order to confer jurisdiction upon the District Court in which the suit is instituted, pre-supposes a prior presence in the United States where a residence or domicile has previously been established and maintained and has no application to one who has theretofore never been in this country. It applies only to those who having acquired such "permanent residence" in the United States who have gone abroad and seek to return after having done some act which it is claimed has alienated their American citizenship.

Permanent residence can hardly be acquired by proxy.

A painstaking search by us has failed to uncover any adjudicated case dealing with this precise question. There are, of course, cases dealing with the term "residence" and "domicile" wherein those terms

have been defined, such as *Deming ex rel U. S. vs. Ward*, 37 Fed. (2d) 818, and *Lamar v. Micou*, 112 U.S. 452, but none under the Immigration Laws directly holding that where, as here, the husband leaving his wife in China for a period of ten years is said to have established a domicile in the United States while his wife was domiciled in a foreign country with the minor children of the parties.

We believe, under the circumstances of this case, that the jurisdiction was in the District Court for the District of Columbia and the District Court for the Western District of Washington was in error in its determination of jurisdiction.

ON THE MERITS

Prior to his temporary admission to the United States under a "visitor's permit" to enter this country to prosecute this action in the month of February, 1949, Appellee had never set foot on American soil. His entry in 1949 was permitted for the purpose of prosecuting this action.

His claim to the status of a National of the United States stems from his father, whom we admit, is the son of a native-born American citizen of Chinese extraction.

The Act which entitled a person born abroad to

claim the status of a National of the United States is a part of the Nationality Act of 1940, Title 8, U.S.C.A., Section 601(g) of which provides:

> "The following shall be Nationals and citizens of the United States, at birth:
>
> "(g) A person born outside the United States * * * of parents, one of whom is a citizen of the United States, *who, prior to the birth of such person, has had ten years residence in the United States.*"

The evidence adduced at the trial shows that the father of Appellee first arrived in the United States on September 3, 1929, at Boston, Massachusetts. That he left the United States for China on August 21, 1936, being in the United States 7 years less 13 days. He re-entered the United States on August 8, 1938, being absent 2 years less 13 days. He left the United States for China on January 6, 1940, and was re-admitted on September 4, 1941, being absent just 1 year and 9 months. It was during this latter visit to China, and while the father was still in China, that the Appellee was born on March 16, 1941.

As so clearly stated by the trial court (R. 71) "Arithmetical computation will disclose that his physical presence in the United States prior to his son's (Appellee's) birth in 1941 was about eight years and fourth months."

The Congress clearly provided for a residence of the father of *ten years* "prior to the birth" of Appellee.

In view of the fact that the father was in China when the son was born and did not return to the United States until six months after such birth, is strong evidence that he had established some sort of residence in China as early as July, 1940, or possibly earlier in that year because he left the United States in January, 1940, and did not re-enter the United States until September 1941.

The period which persons are required to live in the United States and be associated with the American manner of living was set by the Congress at *ten* years and not less. It seems clear that Congress in fixing the ten-year minimum residence requirement did not contemplate constructive residence as sufficient under this section of the law since this would, in effect, defeat the very purpose of the restriction.

Appellee's claim to American nationality rests entirely upon the allegation that his great grandfather was born in the United States.

The father, Yee Don Found, claims that his father, Yee Wing Haw, was born in China in 1890,

and when he (Yee Don Found) secured a passport to visit China in 1947, Yee Wing Haw was residing in China. It appears, therefore, that Yee Wing Haw, the grandfather of Appellee, is at best a nominal American citizen. Yee Don Found was born in China in 1913 and remained in China until 1929. It clearly appears, therefore, that the father of Appellee spent the formative years of his life in China, because he was sixteen years of age when he first came to this country. At the time of Appellee's birth in China in 1941, his father, Yee Don Found, was twenty-seven years of age. As of that date the father, Yee Don Found, had spent nineteen years and two months in China, and eight years and four months in the United States. From this, then, it clearly appears that at the time of the birth of Appellee in China in 1941 the father's place of general abode during his life had been China, and it is somewhat difficult to conclude that Appellee's father could, in periods of time spent in the United States, acquire that knowledge and experience in the American way of life which the minimum of ten years' residence the Congress believes to be necessary has not actually been spent in this country to entitle the offspring to successfully claim American nationality.

There is nothing, it seems to us, in the case of *United States v. Rockteschell*, 208 Fed. 530, from this circuit which militates against this view. That was a naturalization case, and, after discussing that particular statute, it was said:

> "There is, however, no contention that since his first arrival, in 1894, he ever claimed a residence or a house, or in fact resided, in any other country."

The contrary is true here. The family of the father of Appellee, that is, his mother and two other brothers, certainly had their residence in China at all times until shortly before the trial of this case in 1949, and almost three years of the time prior to the birth of Appellee were spent by the father with his family in China. Surely it cannot be seriously contended that this three-year period spent in China with his family did not constitute the taking up, at least, of temporary residence in China by the father, which constitutes practically one-third of the ten-year residence requirement under the statute to entitle Appellee to successfully claim American nationality.

This case is one of first impression as we have been unable, after painstaking search and study, to find any adjudicated case where similar facts were involved.

We believe the District Court was in error in holding, as it did, that the father of Appellee had resided in the United States ten years preceding the birth of Appellee and its decree declaring Appellee to be a National of the United States should be reversed.

Respectfully submitted,

J. CHARLES DENNIS
United States Attorney

JOHN E. BELCHER
Assistant United States Attorney

1017 U. S. Court House
Seattle, Washington